

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RONALD JOHN BRENNAN, JR.,

Plaintiff,

v.

JEFF LARSEN, *et al.*,

Defendants.

Case No. C16-1304-RSM-JPD

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

This is a *pro se* civil rights action proceeding under 42 U.S.C. § 1983. Plaintiff Ronald Brennan has been granted leave to proceed with this action *in forma pauperis*. Service has not been ordered. This Court, having reviewed plaintiff's amended complaint and the balance of the record, concludes that plaintiff has not stated a cognizable ground for relief in this action. This Court therefore recommends that plaintiff's amended complaint and this action be dismissed without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

BACKGROUND

On August 17, 2016, plaintiff presented to this Court for filing a civil rights complaint under § 1983 in which he alleged that he had been retaliated against by the Department of

1 Corrections and the food service staff at the Monroe Correctional Complex (MCC) for utilizing  
2 the grievance system to complain that his kosher meals were missing the fruit that the menu  
3 called for. (*See* Dkt. 1-1.) Plaintiff asserted that the retaliation took the form of derogatory  
4 remarks being written on one of his kosher meal plates and rotten fruit being included on  
5 subsequent meal plates. (*See id.*) Plaintiff identified the Department of Corrections (DOC),  
6 Food Service Manager Jeff Larsen, and Grievance Coordinator Lee Stemler as defendants in his  
7 complaint. (*Id.*) Plaintiff requested damages in the amount of \$10,000. (*Id.*)

8       After reviewing plaintiff's complaint, this Court determined that plaintiff had not  
9 adequately alleged a cause of action under § 1983 and, thus, the Court issued an Order declining  
10 to serve plaintiff's complaint and granting him leave to amend. (Dkt. 7.) In that Order, the  
11 Court explained that the DOC was not amenable to suit under § 1983. (*Id.* at 3.) The Court  
12 further explained that plaintiff had not alleged facts demonstrating that either defendant Larsen  
13 or defendant Stemler personally participated in causing him harm of federal constitutional  
14 dimension. (*Id.* at 3-4.)

15       The Court noted that the facts alleged in the complaint demonstrated that (1) defendant  
16 Stemler accepted and processed plaintiff's grievance regarding his incomplete kosher meals and  
17 forwarded the grievance to defendant Larsen for investigation, (2) defendant Larsen investigated  
18 the grievance by discussing the grievance with plaintiff and inmate employees of the diet  
19 kitchen, (3) defendant Larsen took steps to address plaintiff's concerns including monitoring  
20 diets to ensure that the fruit for kosher meals was placed with the meal, and (4) defendant Larsen  
21 identified the individual who wrote the derogatory remarks on plaintiff's plate and took  
22 appropriate administrative action against that individual. (*Id.* at 4.) The Court explained that  
23 these facts were insufficient to support any allegation that either defendant Larsen or defendant

1 Stemler engaged in retaliatory conduct. (Dkt. 7 at 4.) Plaintiff was granted thirty days to file an  
2 amended complaint stating a viable claim for relief. (*Id.*)

3 On September 7, 2016, plaintiff filed an amended complaint in which he identified Food  
4 Service Manager Larsen, Grievance Coordinator Stemler, and fellow inmate Charles Bingham as  
5 defendants. (Dkt. 8.) Plaintiff's statement of claim in his amended complaint is much less  
6 detailed than that set forth in his original complaint, and it appears that plaintiff intends his  
7 amended complaint to serve as a supplement to, rather than a substitute for, his original  
8 complaint.<sup>1</sup> Plaintiff asserts in his amended pleading that after he filed his grievance complaining  
9 about the food department's failure to follow DOC policy, defendant Stemler sent the grievance  
10 to defendant Larsen. (Dkt. 8 at 3.) Plaintiff asserts that defendant Larsen, in turn, showed the  
11 grievance to employees in the diet kitchen, in particular to defendant Bingham, and that this  
12 caused the kitchen employees to take retaliatory actions against plaintiff because the employees  
13 had to do extra work to ensure that plaintiff's meals complied with DOC policy. (*Id.*) Plaintiff  
14 does not provide any detail about the alleged retaliatory actions of the kitchen employees in his  
15 amended pleading, he merely references writing on his food tray which he claims was degrading  
16 and demeaning. (*Id.*)

### 17 DISCUSSION

18 In order to sustain a civil rights action, a plaintiff must show (1) that he suffered a  
19 violation of rights protected by the Constitution or created by federal statute, and (2) that the  
20 violation was proximately caused by a person acting under color of state or federal law. *See*  
21 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9<sup>th</sup> Cir. 1991). To satisfy the second prong, a plaintiff

---

22 <sup>1</sup> The Court specifically advised plaintiff in its order declining to serve his original complaint that an  
23 amended pleading operates as a complete substitute for an original pleading. However, whether viewed separately  
or together, plaintiff's pleadings do not adequately allege any cause of action under § 1983. (*See* Dkts. 6 and 8.)

1 must allege facts showing how individually named defendants caused, or personally participated  
2 in causing, the harm alleged in the complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9<sup>th</sup> Cir.  
3 1981). The causation requirement of § 1983 is satisfied only if a plaintiff demonstrates that a  
4 defendant did an affirmative act, participated in another's affirmative act, or omitted to perform  
5 an act which he was legally required to do that caused the complained of deprivation. *Id.* (citing  
6 *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9<sup>th</sup> Cir. 1978)).

7 To state a viable First Amendment retaliation claim, a prisoner must allege five elements:  
8 “(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3)  
9 that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his  
10 First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional  
11 goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9<sup>th</sup> Cir. 2005). In order to prevail on a  
12 retaliation claim, “a plaintiff must show that his protected conduct was the substantial or  
13 motivating factor behind the defendant’s conduct.” *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9<sup>th</sup>  
14 Cir. 2009) (citation and internal quotation omitted).

15 None of the conduct which plaintiff attributes to defendants Stemler and Larsen can  
16 reasonably be construed as “adverse action” against plaintiff. Defendant Stemler merely  
17 accepted plaintiff’s grievance and passed it along to defendant Larsen, and defendant Larsen  
18 merely investigated plaintiff’s complaint and apparently attempted to take corrective action.  
19 While plaintiff alleges that defendant Larsen “caused” the inmate kitchen employees to retaliate  
20 against him by identifying plaintiff as the complainant, plaintiff alleges no facts suggesting that  
21 defendant Larsen’s purpose in identifying plaintiff to the inmate kitchen employees was to  
22 effectively punish plaintiff for filing a grievance. Moreover, the exhibits attached to plaintiff’s  
23 original pleading appear to demonstrate that defendant Larsen identified, and took corrective

1 action against, the individual responsible for writing derogatory remarks on plaintiff's tray,  
2 which undermines any suggestion that defendant Larsen's identification of plaintiff during the  
3 investigation was intended to cause plaintiff harm.

4 When the Court views all of plaintiff's materials together, and places the conduct of  
5 defendants Stemler and Larsen in context, plaintiff has demonstrated nothing more than that  
6 defendants attempted to resolve plaintiff's grievance. Whether or not plaintiff's grievance might  
7 have been resolved without revealing plaintiff's identity, the fact that plaintiff's identity was  
8 revealed during the process is not sufficient to establish adverse action for purposes of plaintiff's  
9 retaliation claim.

10 The only individual against whom plaintiff makes any legitimate claim of adverse action  
11 is defendant Bingham. It was apparently defendant Bingham who wrote the derogatory remarks  
12 on plaintiff's meal tray.<sup>2</sup> (See Dkt. 6 at 4.) As noted above, in order to sustain a cause of action  
13 under § 1983, a plaintiff must show that any alleged constitutional violation was committed by a  
14 person acting under color of state law. Acting "under color of state law" requires that a  
15 defendant have exercised power "possessed by virtue of state law and made possible only  
16 because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42,  
17 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Thus, the question that  
18 must be addressed in determining whether a person is subject to suit under § 1983 is whether the  
19 alleged infringement of federal rights is "fairly attributable" to the state. *See Lugar v.*  
20 *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838  
21 (1982).

---

22 <sup>2</sup> Plaintiff alleged in his original complaint that employees in the diet kitchen also put rotten oranges on his  
23 plate for several meals after they were made aware of his grievance, but plaintiff does not specifically identify those  
employees. (See Dkt. 6 at 4.)

1 Defendant Bingham is a fellow inmate of plaintiff's, and plaintiff sets forth no facts in  
2 either his original or amended complaints which demonstrate that defendant Bingham's alleged  
3 retaliatory conduct was fairly attributable to the state. Defendant Bingham therefore may not be  
4 held liable in this action brought under § 1983.

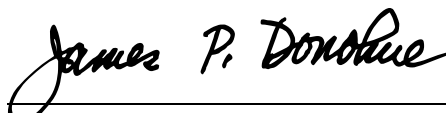
5 CONCLUSION

6 As plaintiff has not alleged in his amended complaint a cognizable ground for relief  
7 against any of the named defendants, this Court recommends that plaintiff's amended complaint  
8 and this action be dismissed without prejudice, prior to service, under § 1915(e)(2)(B)(ii). A  
9 proposed order accompanies this Report and Recommendation.

10 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
11 served upon all parties to this suit by no later than **November 14, 2016**. Failure to file objections  
12 within the specified time may affect your right to appeal. Objections should be noted for  
13 consideration on the District Judge's motion calendar for the third Friday after they are filed.  
14 Responses to objections may be filed within **fourteen (14)** days after service of objections. If no  
15 timely objections are filed, the matter will be ready for consideration by the District Judge on  
16 **November 18, 2016**.

17 This Report and Recommendation is not an appealable order. Thus, a notice of appeal  
18 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the  
19 assigned District Judge acts on this Report and Recommendation.

20 DATED this 24th day of October, 2016.

21 

22 JAMES P. DONOHUE  
23 Chief United States Magistrate Judge